A

GOOD VIEW PROPERTY SDN BHD

v.

STANDARD CHARTERED BANK MALAYSIA BERHAD

B

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
ROHANA YUSUF JCA
MOHD ZAWAWI SALLEH JCA
[CIVIL APPEAL NO: W-02-817-04-2012]

C

7 MAY 2014

CONTRACT: *Sale and purchase agreement - Letters of undertaking - Breach - Allegation of - Failure to release balance of purchase price - Refusal by respondent to honour obligations due to allegation of fraud -*

D *Respondent relied on findings based on interviews with agents, valuers and purchasers - Failure to call interviewees - Whether trial judge erred in improperly admitting hearsay evidence - Whether fraud proved - Whether respondent breached its contractual obligations under letters of undertaking - Whether respondent should comply with the letters of undertaking*

E

CONTRACT: *Letters of undertaking - Non-compliance of - Fraud - Allegation of - Whether proved - Failure to release balance of purchase price - Refusal by respondent to honour obligations due to allegation of fraud - Respondent relied on findings based on interviews with agents,*

F *valuers and purchasers - Failure to call interviewees - Whether trial judge erred in improperly admitting hearsay evidence - Whether fraud proved - Whether respondent breached its contractual obligations under letters of undertaking - Whether respondent should comply with the letters of undertaking*

G

EVIDENCE: *Admissibility of evidence - Hearsay - Breach of letters of undertaking - Refusal by respondent to honour obligations due to allegation of fraud - Respondent relied on DW1's findings based on interviews with agents, valuers and purchasers - Failure to call interviewees - Whether trial judge erred in improperly admitting hearsay evidence*

H

This was the appellant's appeal against the High Court's decision in dismissing the appellant's claim against the respondent for a declaration that the respondent had breached its obligations under several letters of undertaking and an order that the respondent

I comply with the letters of undertaking to pay the sum of RM7,776,000 being the amount due thereunder. The appellant, a

developer of a project 'Taman Saujana' in Johor, entered into five sale and purchase agreements with purchasers in which the appellant agreed to sell and the purchasers agreed to purchase properties subject to terms and upon the conditions contained in the respective agreements. The purchasers paid 10% of the purchase price and applied for and obtained bank loan from the respondent for the balance of the purchase prices. The respondent paid the redemption amounts and obtained the issue documents of title to the properties from the respective finance companies. The appellant subsequently executed the relevant memoranda of transfer in favour of the purchasers and the relevant memoranda of charge in favour of the respondent. The appellant also issued letters of undertaking to the effect that, in the event the discharge of charges, memoranda of transfer and the memoranda of charges could not be registered, the appellant would reimburse the monies paid. The respondent also issued letters of undertaking and undertook to pay to the appellant, for and on behalf of the purchasers, the balance purchase price once the conditions precedent had been satisfied. Prior to the respondent fulfilling its obligations under the letters of undertaking, the respondent discovered that the purchasers had used fraudulent means to obtain the said financing. As a result, the respondent refused to honour its obligations under the letters of undertaking. The appellant then commenced legal action for the amounts payable under the letters of undertaking. The High Court Judge decided in favour of the respondent primarily on the ground that the letters of undertaking were linked to the financing allegedly obtained by fraud and that the appellant had failed to adduce evidence to rebut the same. Hence, this appeal. It was the appellant's submission that the trial judge's finding on the issue of fraud was clearly erroneous and that the respondent had merely relied on hearsay evidence.

Held (allowing appeal with costs)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) The respondent's complaint was that the purchasers had used false and/or forged documents, with inflated property value for the purpose of obtaining more loan sums than what ought to have been. In its attempt to prove fraud, the respondent had relied on the evidence of DW1, the head of the fraud and investigation unit of the respondent, who had investigated the alleged perpetration of fraud. However, DW1's findings were

based on interviews with agents, valuers and purchasers. They were not from or within his own knowledge. To prove fraud, the relevant interviewees must be called to testify on the relevant documents that were alleged to be false and/or forged as well as explain how the alleged fraud was carried out. In this case, the interviewees were not called to give evidence to prove the truth of the matter. (paras 15 & 21)

(2) The investigation report by DW1 in the instant appeal was merely an internal investigation report, lacked independence and thereby of lower probative value than an independent audit report. Thus, DW1's oral evidence in respect of the fraud was therefore hearsay and clearly inadmissible. The trial judge ought to have rejected DW1's evidence in respect of the fraud. Any reference to statements made in the interviews and documents referred to therein were inadmissible and could not be taken as evidence to prove fraud. Stripped of the hearsay evidence, there was not a shred of other evidence to sustain the finding on fraud. The allegation of fraud by the respondent had not been established as the respondent had not discharged the burden of proving fraud beyond reasonable doubt. Hence, the trial judge had erred and had improperly admitted hearsay evidence when deciding against the appellant. (paras 21, 22 & 26)

(3) Upon perusing the words and operative terms used in the undertaking from the respondent to the appellant, the intention of the parties were clear. The respondent undertook to release the sum to the appellant upon the appellant satisfying conditions laid down by the bank in the letters. Based upon the evidence on record, the preconditions had been satisfied. The respondent was thus under a contractual obligation with the appellant to release the balance of the purchase price. (paras 30 & 31)

(4) The undertaking was an agreement or a promise by the respondent to pay the appellant on behalf of the purchasers/borrowers under the sale and purchase agreements and pursuant to the loan agreements. The letters of undertakings were inextricably linked to the loan agreements as well as the sale and purchase agreements. Since fraud was not proven, there was no reason why the respondent should not honour the letters of undertaking issued pursuant to the loan agreements. (paras 32 & 33)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi menolak tuntutan perayu terhadap responden untuk satu pengisytiharan bahawa responden telah melanggar obligasinya di bawah beberapa surat akujanji dan satu perintah supaya responden mematuhi surat-surat akujanji dan membayar amaun RM7,776,000 sebagai jumlah terhutang di bawahnya. Perayu, pemaju projek 'Taman Saujana' di Johor, telah memasuki lima perjanjian jual beli dengan pembeli di mana perayu bersetuju untuk membayar dan pembeli bersetuju untuk membeli hartanah tertakluk kepada terma dan syarat-syarat yang terkandung dalam perjanjian masing-masing. Pembeli-pembeli membayar 10% dari harga belian dan memohon serta memperolehi pinjaman bank daripada responden untuk baki harga belian. Responden membayar jumlah penebusan dan telah memperolehi isu dokumen hakmilik ke atas hartanah daripada syarikat-syarikat kewangan masing-masing. Perayu kemudiannya telah melaksanakan memorandum pemindahan relevan yang memihak kepada pembeli-pembeli dan memorandum caj yang memihak kepada responden. Perayu-perayu juga mengeluarkan surat-surat akujanji yang membawa maksud, sekiranya terjadi pelepasan caj, memorandum pemindahan dan memorandum caj tidak boleh didaftarkan, perayu akan membayar balik wang yang dibayar. Responden juga mengeluarkan surat-surat akujanji dan bersetuju untuk membayar kepada perayu, untuk dan bagi pihak pembeli, baki harga belian apabila syarat-syarat terdahulu telah dipenuhi. Sebelum responden memenuhi obligasinya di bawah surat-surat akujanji, responden mendapati bahawa pembeli-pembeli telah menggunakan cara penipuan untuk mendapatkan pinjaman tersebut. Akibatnya, responden enggan memenuhi obligasinya bawah surat-surat akujanji. Perayu memulakan tindakan undang-undang untuk jumlah yang perlu dibayar bawah surat-surat akujanji. Hakim Mahkamah Tinggi membuat keputusan yang memihak kepada responden atas alasan bahawa surat-surat akujanji adalah terikat dengan pinjaman yang didakwa telah diperolehi secara frod dan perayu telah gagal mengemukakan keterangan untuk menyangkal yang sama. Oleh itu, rayuan ini. Adalah menjadi hujahan perayu bahawa dapatan hakim bicara atas isu frod adalah dengan jelasnya salah dan responden hanya bergantung kepada keterangan dengar cakap.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Mohd Zawawi Salleh JCA menyampaikan penghakiman mahkamah:

(1) Aduan responden adalah bahawa pembeli-pembeli telah menggunakan dokumen palsu dan/atau dipalsukan, dengan nilai hartanah yang melambung bagi tujuan memperolehi amaun pinjaman lebih daripada apa yang sepatutnya. Dalam percubaannya untuk membuktikan frod, responden telah bergantung kepada keterangan DW1, ketua unit penipuan dan penyiasatan responden, yang telah membuat siasatan ke atas perbuatan penipuan yang telah didakwa. Walau bagaimanapun, dapatan DW1 adalah berdasarkan temubual dengan ejen, penilai dan pembeli. Ia bukan daripada atau dalam lingkungan pengetahuannya sendiri. Untuk membuktikan frod, mereka yang telah ditemubual harus dipanggil untuk memberi keterangan berkenaan dokumen-dokumen relevan yang didakwa adalah palsu dan/atau dipalsukan dan juga untuk memberi penjelasan bagaimana frod yang didakwa itu telah dilakukan. Dalam kes ini, mereka yang ditemubual tidak dipanggil untuk memberi keterangan bagi membuktikan kebenaran perkara itu.

(2) Laporan siasatan oleh DW1 dalam rayuan ini hanyalah laporan siasatan dalaman semata-mata, tidak boleh berdiri sendiri dan dengan itu mempunyai nilai probatif yang rendah jika dibandingkan dengan laporan audit bebas. Oleh itu, keterangan lisan DW1 berkenaan frod adalah dengar cakap dan tidak boleh diterima masuk. Hakim bicara sepatutnya menolak keterangan DW1 berkenaan frod. Apa-apa rujukan yang dibuat kepada kenyataan yang dibuat dalam temubual dan dokumen yang dirujuk adalah tidak diterima masuk dan tidak boleh digunakan sebagai keterangan untuk membuktikan frod. Tanpa keterangan dengar cakap, tiada bukti lain untuk mempertahankan dapatan frod. Dakwaan frod oleh responden gagal dibuktikan kerana responden tidak melepaskan beban membuktikan frod melampaui keraguan munasabah. Oleh itu, hakim bicara khilaf apabila dengan tidak sewajarnya menerima keterangan dengar cakap semasa membuat keputusan terhadap perayu.

(3) Apabila meneliti perkataan dan syarat-syarat berkuatkuasa yang digunakan dalam akujanji dari responden kepada perayu, niat pihak-pihak terlibat adalah jelas. Responden telah berjanji untuk melepaskan amaun kepada perayu sebaik sahaja perayu

memenuhi syarat-syarat yang telah dibentangkan oleh pihak bank dalam surat-surat itu. Berdasarkan keterangan atas rekod, prasyarat telah dipenuhi. Responden juga mempunyai obligasi secara kontraktual kepada perayu untuk melepaskan baki harga belian.

(4) Surat akujanji adalah persetujuan atau perjanjian oleh responden untuk membayar perayu bagi pihak pembeli/peminjam di bawah perjanjian jual beli dan menurut perjanjian pinjaman. Surat akujanji adalah berkait rapat dengan perjanjian pinjaman dan perjanjian jual beli. Oleh kerana frod telah gagal dibuktikan, tiada sebab mengapa responden tidak boleh memenuhi surat-surat akujanji yang dikeluarkan menurut perjanjian pinjaman.

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 1 FC ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Anor Appeal [1996] 3 CLJ 163 FC ***(refd)***

Federal Flour Mills Bhd v. Fima Palmbulk Services Sdn Bhd & Another Appeal [2005] 4 CLJ 47 CA ***(refd)***

Michael C Solle v. United Malayan Banking Corp Bhd [1984] 1 CLJ 151 FC ***(refd)***

Re Strand Music Hall Co Ltd [1865] 35 Beav 153 ***(refd)***

UEM Group Bhd. v Genisys Integrated Engineering Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2014] 5 CLJ 154 CA ***(Refd)***

Legislation referred to:

Contracts Act 1950, ss. 17, 18, 19
Evidence Act 1950, ss. 60, 167

For the appellant - Vijaya Gopal (Kamala Gopal with him); M/s Vijaya Gopal & Assocs

For the respondent - Alvin Julian (Ankit R Sanghvi with him); M/s Shearn Delamore & Co

[Appeal from High Court, Kuala Lumpur; Suit No: D11-22-1723-2008]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

B **[1]** This appeal is directed against the learned High Court Judge's decision dated 8 March 2012 in dismissing the appellant's claim against the respondent for a declaration that the respondent had breached its obligations under several letters of undertaking and an order that the respondent complies with the letters of C undertaking to pay the sum of RM7,776,000, being the amount due thereunder.

Background Facts

D **[2]** Briefly, the facts leading up to the commencement of the suit by the appellant are as follows.

[3] The appellant is the developer of a project known as "Taman Saujana" in Johor. The appellant entered into five sale and purchase agreements with purchasers in which the appellant E agreed to sell and the purchasers agreed to purchase properties subject to terms and upon the conditions contained in the respective agreements.

[4] Pursuant to the sale and purchase agreements, the F purchasers paid 10% of the purchase price and applied for and obtained bank loan from the respondent for the balance of the purchase prices.

[5] As agreed, the respondent paid the redemption amounts and obtained the issue documents of title to the properties from the G respective finance companies. In accordance with the terms of redemption, the finance companies executed the relevant discharge for the charges that were in existence then and the same were registered in the Land Registry, Johor Bahru.

H **[6]** The appellant subsequently executed the relevant memoranda of transfer in favour of the purchasers and the relevant memoranda of charge in favour of the respondent.

[7] The appellant also issued letters of undertaking to the effect I that, in the event the discharge of charges, memoranda of transfer and the memoranda of charges could not be registered, the appellant would reimburse the monies paid. The respondent also

issued letters of undertaking and undertook to pay to the appellant, for and on behalf of the purchasers, the balance purchase price once the conditions precedent have been satisfied.

[8] The memoranda of transfer and the memoranda of charge were duly registered with the Land Registry, Johor Bahru. Pursuant thereto, the respondent's solicitors had advised the respondent to release the balance purchase prices to the appellant's solicitors for their onward transmission to the appellant.

[9] Prior to the respondent fulfilling its obligations under the letters of undertaking, the respondent discovered that the purchasers had used fraudulent means to obtain the said financing. As a result, the respondent refused to honour its obligations under the letters of undertaking.

[10] The appellant then commenced legal action for the amounts payable under the letters of undertaking. The learned High Court Judge decided in favour of the respondent primarily on the ground that letters of undertaking are linked to the financing allegedly obtained by fraud and that the appellant had failed to adduce evidence to rebut the same.

The Appeal

[11] We have heard the appeal on 18 October 2013. Upon perusal of the appeal records, and after having heard from the parties at length, we are of the considered view that this is a case in which appellate intervention is warranted. Therefore, we have allowed the appeal and set aside the order of the High Court.

[12] We now give our reasons for so deciding.

Fraud

[13] The respondent submitted that if the appellant's claim is allowed; it would contravene ss. 17, 18 and 19 of the Contracts Act 1950. It was the respondent's contention that, one Tan Ah Huat, a property agent of the appellant, had played an active role in the perpetration of the fraud. For that reason, the respondent alleged, the appellant had acted in *particeps criminis* with the purchasers in the commission of the said fraud. Further, the appellant failed to adduce any rebuttal evidence to dislodge the allegation of fraud.

[14] It is settled law that the standard of proof required where there is an allegation of fraud in a civil proceeding must be one of beyond reasonable doubt. (See *Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1, *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770). The burden of proving fraud is on the party alleging it and in this case, the respondent.

[15] The respondent's complaint was that the purchasers had used false and/or forged documents, with inflated property value for the purpose of obtaining more loan sums than what ought to have been. In its attempt to prove fraud the respondent relied on the evidence of Koe Chong Jin (DW1). DW1 was the head of the fraud and investigation unit of the respondent who had investigated the alleged perpetration of fraud. His evidence on fraud may be summarised as follows:

(i) He interviewed several persons and purchasers and identified three persons who had played an active role in the perpetration of the fraud. They were Tan Ah Huat, Jenny Tai and Zainal bin Osman;

(ii) Tan Ah Huat was the property agent of the appellant at the material time. Tan Ah Huat requested Zainal, a property valuer with Messrs Yap, Burgess Rawson, to accept the sale price without conducting the any valuation;

(iii) Tan Ah Huat submitted the loan applications to Jenny (the direct sales agent of the respondent) for her onward processing;

(iv) He discovered through his investigations that the fair market value of the properties were substantially lower than the value submitted to the respondent;

(v) In his interview with the purchasers he found that the letters of employment and pay-slips were created by companies that did not exist; and

(vi) DW1 came to a conclusion that the appellant had colluded with the purchasers to defraud the respondent.

[16] In respect of the finding of fraud the learned trial judge summarised her conclusion as follows: A

> No rebuttal evidence was put forward by the plaintiff to challenge the evidence of DW1. Based on the totality of the evidence adduced it is clear that the loan agreements were procured fraudulently. The plaintiff failed to rebut the evidence of fraud. B

[17] The appellant submitted that the learned trial judge's finding on the issue of fraud was clearly erroneous as the respondent failed to establish fraud because it did not discharge its burden of proof beyond reasonable doubt. The respondent merely relied on C hearsay evidence. On the other hand, the respondent however submitted that they had discharged the said burden by calling DW1. It is the respondent's case that DW1 was the investigator who took certain steps in the investigation. The respondent contended that DW1's oral evidence was based upon compilation D of information received by him.

[18] The respondent urged the court not to disturb the learned trial judge's finding as the same was based on her assessment of the credibility of the witnesses for whom she had the distinct E advantages of seeing and hearing from the witness box.

[19] We agree with the submission of the learned counsel for the respondent that, if it is a question of credibility, then this court would surely hesitate before it overrules the findings of the learned trial judge. It is however clearly not a question of credibility that F had arisen, but it is a question of admissibility of evidence.

[20] The rule against hearsay is found in s. 60 of the Evidence Act 1950 which read as follows:

G

> (1) Oral evidence shall in all cases whatever be direct, that is to say:
>
> (a) If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;
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> H
>
> (b) If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;
>
> (c) If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that I manner;

A (d) If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the persons who holds that opinion on those grounds.

(2) The opinions of experts expressed in any treatise commonly offered for sale and the grounds on which such opinions are held B may be proved by the production of the treatise if the author is dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

C (3) If oral evidence refers to the existence or condition of any material thing including a document, the court may, if it thinks fit, require the production of that material thing or the document for its inspection.

[21] As we have earlier alluded to, the respondent relied on D DW1's evidence to prove fraud. It is clear that his oral testimony and his findings that "there were fraudulent transactions" were based on interviews with the agents, valuers and the purchasers. They were not from or within his own knowledge. The truthfulness and accuracy of the words spoken by the interviewees E cannot be tested through cross-examination. The interviewees were not called to give evidence to prove the truth of the matter. In other words to prove fraud, the relevant interviewees must be called to testify on the relevant documents that were alleged to be false and/or forged as well as explain how the fraud was carried F out. They would be the persons most competent to describe with certainty the nature of the documents and the truth of their contents. This court in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2014] 5 CLJ 154 held that an audit report (laporan audit 2003) remains a hearsay evidence unless the maker G is called upon to explain its meaning. By comparison to an independent audit report as in the above case, the investigation report by DW1 in the instant appeal is merely an internal investigation report, lacks independence and thereby of lower probative value than an independent audit report.

H **[22]** Thus from the evidentiary point of view, DW1's oral evidence in respect of the fraud is therefore hearsay and clearly inadmissible. The learned trial judge ought to have rejected DW1's evidence in respect of the fraud. Any reference to statements made in the interviews and documents referred to therein are I inadmissible and cannot be taken as evidence to prove fraud.

[23] The next issue to be determined is whether the improper admission of evidence is by itself sufficient reason for allowing this appeal.

[24] The answer is provided in s. 167 of the Evidence Act 1950 that reads as follows:

> The improper admission or rejection of evidence shall not be the ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision or that, if rejected evidence had been received, it ought not to have varied the decision.

[25] As can be gleaned from the above section, the test to determine whether or not the judgment of the High Court should be reversed or altered on account of wrongful admission of DW1's evidence is whether or not without that evidence there was sufficient evidence to justify the decision. (See *Juraimi Husin v. PP* [1998] 2 CLJ 383; [1998] 1 MLJ 537 (CA)).

[26] Applying the test to the facts of the present case, we are of the view that strip of the hearsay evidence, there is not a shred of other evidence to sustain the finding on fraud. The allegation of fraud by the respondent has not been established as the respondent has not discharged the burden of proving fraud beyond reasonable doubt. That being the case, the learned trial judge has erred in her finding of fraud on the basis that the appellant did not adduce evidence to rebut fraud. No such burden had arisen in the first place.

Letter Of Undertaking

[27] Learned counsel for the appellant submitted that the learned trial judge had wrongly construed the letters of undertaking. According to the counsel, the respondent is not abrogated from performing its obligations pursuant to the letters of undertaking after the preconditions in the undertaking have been satisfied.

[28] Now, the principles of construction to be applied to the undertakings are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used (See *Michael C Solle v. United Malayan Banking Corp Bhd* [1984] 1 CLJ 151; [1986] 1 MLJ 45). This court, in *Federal Flour Mills Bhd v. Fima Palmbulk Services Sdn Bhd & Another Appeal*

A [2005] 4 CLJ 47, made reference to the case of *Re Strand Music Hall Co Ltd* [1865] 35 Beav 153 and cited with approval the observation made by Sir John Romilly, Master of the Rolls at p. 856 on the construction of a written instrument:

B > The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed unless it be impossible to reconcile it with another and more express clause in the same deed. I think I must, if possible, give effect to both these clauses in the articles in question ...

C

[29] The conditions in the letters of undertaking to be satisfied by the appellant before the respondent bank performs its undertaking are as set out below:

D (i) The appellant delivers the original issue documents of title deed to the properties, the duly executed memorandums of transfer and the relevant architect's certificate;

(ii) The appellant confirms that the difference between the loan and the purchase price shall first have been paid in full by the E said purchasers; and

(iii) The appellant issues letters of undertaking that it shall refund to the respondent all monies disbursed by them in the event the said transfer is denied.

F

[30] In this instance case, upon perusing the words and operative terms used in the undertaking from the respondent to the appellant, we are of the opinion that the intentions of the parties are clear. The respondent undertook to release the sum to the G appellant upon the appellant satisfying conditions laid down by the bank in the letters.

[31] Based upon the evidence on record, we are indeed satisfied that all preconditions have been satisfied. We are in agreement with the appellant's counsel that upon true construction of the H respondent's letters of undertaking, the respondent was under a contractual obligation with the appellant to release the balance of the purchase price.

[32] We would venture on to say that on the facts of the present I case, the letters of undertaking emanate from the loan agreements. The undertaking is an agreement or a promise by the respondent to pay the appellant on behalf of the purchasers/borrowers under

the sale and purchase agreements and pursuant to the loan agreements. The sums to be paid thereunder are comprised in the loan amounts, as between the appellant and purchasers, as well as the balance of the purchase prices, as between the purchasers and the appellant. For that reason, we are of the view that the letters of undertakings are inextricably linked to the loan agreements as well as the sale and purchase agreements.

[33] Since fraud has not been proven there is no reason why the respondent should not honour the letters of undertaking issued pursuant to the loan agreements.

Conclusion

[34] It is settled law that an appellate court will not interfere with the trial court's decision unless it can be demonstrated that the trial court is guilty of insufficient judicial appreciation of evidence (See *UEM Group Bhd. v Genisys Integrated Engineering Pte Ltd & Anor* [2010] 9 CLJ 785, *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Anor Appeal* [1996] 3 CLJ 163). Based upon the above reasons, we find that this is a fitting case warranting appellate intervention. In our view, the learned trial judge had erred and had improperly admitted hearsay evidence when deciding against the appellant.

[35] We, therefore, allow the appeal with costs fixed at RM40,000 here and below. Deposits to be refunded to the appellant. We set aside the decision of the High Court.